84-1444

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No. .....

IN THE

Supreme Court of the United States

October Term, 1984

REX J. PRICE,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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44 pp

QUESTION PRESENTED

Whether collateral estoppel, as an aspect of double jeopardy protection, bars a conviction based on *evidence introduced in a second jury trial* on a superceding conspiracy indictment which was *identical to evidence rejected by a prior jury in acquitting Petitioner of perjury and tax evasion* but finding him guilty of conspiracy, the first conspiracy conviction having been reversed for witness bolstering.

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IN THE

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October Term, 1984

No. .....

REX J. PRICE,

Petitioner

versus

UNITED STATES OF AMERICA,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Petitioner, REX J. PRICE, respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit entered on January 2, 1985.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Texas, Dallas Division, was entered on January 2, 1985 [App. A]. Motion for rehearing thereof was denied by order dated February 11, 1985 [App. C].

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1). Jurisdiction of the United States Court of Appeals was pursuant to 28 U.S.C. 1291. Jurisdiction of the United States District Court was pursuant to 18 U.S.C. 3231.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

I. Proceedings in the Courts Below

Petitioner, REX J. PRICE, was an employee of the Army Air Force Exchange Service (AAFES) headquartered in Dallas, Texas. He was originally indicted and tried for conspiracy to commit bribery and defraud the Government, perjury, and tax evasion [App. D]. The trial resulted in a verdict of acquittal of perjury and tax evasion and conviction for conspiracy. Petitioner's conviction on the conspiracy count was reversed by the United States Court of Appeals for the Fifth Circuit because of improper bolstering of witness testimony [App. B].

After remand, Petitioner was tried on a curative superceding indictment limited to conspiracy to violate 18 U.S.C. 201(g). Conspiracy to defraud the United States (18 U.S.C. 371) was omitted from the superceding indictment [App. E].

During the second trial, the Government presented evidence substantially identical to that presented in the first trial. The jury returned a verdict of guilty, and Petitioner was sentenced to the maximum prison term of five years and a $5,000 fine.

Petitioner gave notice of appeal to the United States Court of Appeals for the Fifth Circuit, which affirmed the conviction in an Opinion dated January 2, 1985 [App. A]. Petitioner's motion for rehearing was denied on February 11, 1985 [App. C].

II. Facts Relevant to this Petition

Petitioner was an employee of the Army Air Force Exchange Service (AAFES) from 1966 to September 30, 1981, assigned at AAFES headquarters in Dallas, Texas. His duties included the purchase of toys for resale by AAFES in military exchanges. He was discharged by AAFES on September 30, 1981, because of alleged receipt of gratuities.

The case against Petitioner in his first trial included the testimony of three alleged co-conspirators who were principal officers and owners of Churchill Sales Company, Inc., a toy manufacturer's representative. They testified concerning the gifts to Petitioner of a dinner and cash payments. These officers testified as the result of a plea agreement pursuant to which their company, Churchill Sales Company, Inc., had pleaded guilty and had been fined. Each of them was also given immunity from prosecution. No corroborating evidence of their alleged activities with Petitioner was introduced.

Paul Ylda, a former AAFES employee sentenced to eight years for bribery and mail fraud, testified that he obtained General Electric appliances for Petitioner through an AAFES vendor. He also testified that he shared with Petitioner half of a $1,000 payment received from another vendor.

Petitioner denied receiving any gratuities, money or free merchandise as alleged. He admitted attending dinners and testified that he understood that he was buying the General Electric appliances at a reduced price. He sought but never received an invoice billing him for any of the appliances. Ultimately, he paid for the appliances on April 23, 1981, after his attorney obtained the invoices.

The jury acquitted Petitioner of perjury and tax evasion but convicted him of conspiracy to commit bribery or defraud the Government. The fact findings of the jury on the perjury and tax evasion were logically inconsistent with the findings necessary to support the conspiracy conviction.

Petitioner appealed the conspiracy conviction to the United States Court of Appeals for the Fifth Circuit. It reversed the conviction because witness bolstering had tainted the first jury's finding of guilt [App. B]. The reversal rendered the first conviction totally void.

Upon remand, Petitioner moved to dismiss the original indictment because of the vagueness and multiplicity in the conspiracy count on which he was to be retried. The motion to dismiss was never ruled on because a superceding indictment cured the multiplicity by omitting the "defraud the Government" charge, leaving only conspiracy to violate 18 U.S.C. 201(g) [App. E].

In the second trial, the case against Petitioner consisted of substantially identical evidence to that introduced at his first trial. Essentially, the same witnesses testified to making the same gifts to Petitioner. Petitioner repeatedly objected, on collateral estoppel grounds, to introduction of this evidence. These objections were overruled, as was Petitioner's motion for acquittal on the same ground.

The second jury found Petitioner guilty, and the court assessed the five-year sentence and $5,000 fine.

Petitioner appealed the conviction and requested the Court of Appeals to make the comparisons of evidence, indictments and instructions required by *Ashe v. Swenson,* 397 U.S. 436 (1970), even to the extent of charting the identical testimony in both trials. The Court of Appeals affirmed the conviction. When Petitioner's motion for rehearing and suggestion of en banc consideration were overruled, this petition for writ of certiorari was filed.

REASON FOR GRANTING THE WRIT

A. **Double jeopardy protection has been severely limited by reliance on a reversed conviction to avoid the rule in** *Ashe v. Swenson.*

In its attempt to "reconcile" the inconsistent verdict theory with the doctrine of collateral estoppel, the Court of Appeals has deprived Petitioner of double jeopardy protection by holding ". . . that because Price was *convicted* of conspiracy in the first trial, collateral estoppel does not bar the introduction of evidence in the second trial which directly supports the conspiracy, even though the *same* evidence was offered in the first trial in support of the perjury and tax evasion counts" (emphasis added) [App. A, pg. 7]. Furthermore, in holding that "reconciling inconsistent verdicts with the doctrine of collateral estoppel is best approached on a case by case basis . . . based on realism and rationality" [App. A, pg. 7], the Court declares a rule that is based on a court's judgment of what is rational in a particular case rather than strict adherence to the constitutional protection against double jeopardy.

The Court's statement that the offense on retrial is the same offense on which Petitioner was convicted in the first trial disregards the change made in the superceding indictment [App. E]. The first jury may well have found reason to base its guilty verdict on the "fraud against the Government" portion of the indictment which was eliminated in the superceding indictment.

The decision is contrary to *Ashe v. Swenson, supra,* as it required Petitioner to "run the gauntlet a second time." The same evidence which was before the jury which found him not guilty of perjury and tax evasion was used in a second trial to convict him of a new charge after the first conspiracy conviction was set aside *U.S. v. Price,* 722 F.2d 88 (5th Cir. 1983).

As announced in *Ashe:*

> The determination of whether collateral estoppel applies in a criminal case where a previous judgment of acquittal was based on a general verdict requires a court to examine the record of the prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.
>
> *Ashe, supra,* pg. 444.

Given substantially identical evidence in both trials, the primary question, according to *Ashe,* is: What facts had been decided necessarily by the first jury in acquitting Petitioner of perjury and tax evasion. The perjury count of the indictment read to the first jury in relevant part charged that during Petitioner's Grand Jury testimony:

> 5. During the course of his testimony at the aforesaid time and place, REX J. PRICE, defendant, while under oath, did knowingly and falsely declare with respect to the aforesaid material matter as follows:
>
> [False statements are underscored]
>
> Q. Now Mr. Price, you were Mr. Ylda's supervisor. Are you aware if Mr. Ylda received anything of value from

anyone during the time that he was under your supervision, either mil reps or manufacturers or anybody selling to the Exchange?

A. I know he received some packages in the office that were returned from the manufacturers. It was dates and apricots, dried apricots, this sort of thing. A gift package that was returned to the manufacturer.

Q. Anything else that you're aware of that he received?

A. No, I'm not.

* * *

Q. Has Mr. Ylda ever given you anything of value, either entertained you or given you merchandise, or has he given you money?

A. No. Only if I borrowed — I might have borrowed some money up in New York from him.

* * *

Q. Are you aware that Mr. Ylda was ever entertained, taken to lunch or dinner by anybody selling to AAFES, be it a mil rep, manufacturer's rep, or consultant or manufacturer?

A. Yes.

Q. Can you tell us about that?

A. We both went to dinner. It was in — I believe it was in 1976. I believe we went to dinner with Ray Larsen and Associates.

Q. Who picked up the tab for that?

A. Ray Larsen.

Q. Anything else that you know, that Mr. Ylda was entertained?

A. No. Usually when we worked in the — we were working in the market, we worked through our lunch hour, we might have a sandwich sent up.

Q. Are you aware of Mr. Ylda receiving any merchandise, other than what you just mentioned, that was sent to his home?

A. No, I'm not.

Q. Are you aware of any cash payments made to him?

A. No.

* * *

Q. Now, Mr. Price, as you know, this Grand Jury is investigating bribery, kickbacks and gratuities to AAFES employees. Do you have any information that would be helpful to the Grand Jury in its investigation? Specifically, do you know or have you heard any rumors of AAFES employees receiving money or anything of value from people who sell to the Exchange, be they manufacturers or any of these three agent categories?

A. No, I have not. Other than what I read on the Pezzello thing.

Q. What you read in the newspaper?

A. Yes.

6. *The aforesaid testimony of REX J. PRICE, defendant, as he then and there knew and believed, was false in that REX J. PRICE, defendant, had received monies and other things of value from individuals and companies selling or attempting to sell to AAFES, and further REX J. PRICE, defendant, had knowledge of other AAFES employees receiving monies, gifts and things of value.* (Emphasis added) [App. D. pgs. 4d-7d]

The next to last question quoted above was global in character and covered the entire spectrum of Petitioner's activities and knowledge as an AAFES employee. In paragraph number 6 above, the Government spelled this out in clear terms. The "not guilty" on this count could only mean that the jury found Petitioner had neither received money or anything of value from Ylda or any other person, nor knew of others who had. The tax evasion count was based on Petitioner's failure to report two payments of $8,000 and $1,000 allegedly made by the Churchill Sales Company officers.

Both acquittals, and the perjury acquittal in particular, were premised upon the totality of evidence presented at the first trial, for had the jury believed *any* part of it, they would have had to determine that Petitioner had *some* guilty knowledge about which he had lied to the Grand Jury. To the contrary, the jury found that Petitioner had not lied, and, therefore, the first jury acquitted him of perjury and tax evasion. Thus, Petitioner necessarily "ran the gauntlet" once as to all of the evidence presented at the first trial, and he should not have been forced to relitigate this same evidence. *Ashe v. Swenson, supra.*

Comparison of the two indictments [Apps. D and E] shows that the Government eliminated the "conspiracy to defraud the

Government" charge and went to trial the second time only on "conspiracy to violate 18 U.S.C. 201(g)." Clearly, the second trial was under a more specific indictment and was not a mere retrial of the earlier reversed conviction.

In attempting to distinguish this case from *Ashe v. Swenson, supra,* because of the reversed conviction rendered by the first jury verdict, the Court of Appeals has employed Petitioner's *reversed* conviction against him to uphold the second conviction. The first verdict was infected with error, and it was properly reversed. When it was reversed, it was nullified for all purposes.

It is an elementary rule of law that "the effect of a general and unqualified reversal of a judgment is to nullify it completely and to leave the case standing *as if such judgment had never been rendered*" (emphasis added). 5B C.J.S., *Appeal and Error,* sec. 1950, pg. 511. In fact, the Fifth Circuit had looked to Webster's Dictionary to define the effect of a reversal: "To reverse a judgment, according to Webster's Dictionary, means to overthrow it by a contrary decision, to make it void, to undo or annul it for error." *Atlantic Coast Lines R.R. Co. v. St. Joe Paper Co.,* 216 F.2d 832, 833 (5th Cir. 1954), *cert.den.,* 348 U.S. 962 *and* 348 U.S. 963 (1954). Certainly, it should not be permissible to use a void conviction to deprive a person of his fundamental right to double jeopardy protection. The Government made its election to proceed with a multi-count indictment. It should not now be permitted to disregard the fact findings implicit in the first jury's not guilty verdicts.

CONCLUSION

For the reasons stated, Petitioner believes he has been required to "run the gauntlet" a second time in disregard of double jeopardy protection. This petition for writ of certiorari should, therefore, be granted.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, the counsel of record for the Petitioner, having been admitted to practice before the Supreme Court of the United States, does hereby certify that three (3) copies of this Petition for Writ of Certiorari were deposited in a United States mailbox, with first-class postage prepaid, addressed to The Solicitor General, Department of Justice, Washington, D.C. 20530, and to Jack Williamson, Assistant U.S. Attorney, 1100 Commerce Street, Room 16G28, Dallas, Texas 75242, on March 12, 1985. The undersigned further certifies that all parties required to be served have been served.

WILLIAM F. BILLINGS

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1445

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

REX J. PRICE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(January 2, 1985)

Before GEE, WILLIAMS and JOLLY, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

This second appeal after a second conviction presents the issue of whether the doctrine of collateral estoppel applies to the facts of this case to bar retrial. In the first trial, Rex Price, a former employee of the Army Air Force Exchange Service (AAFES), was indicted on three counts: conspiracy to obtain gratuities, making false statements before the grand jury, and income tax evasion. The first jury acquitted Price of the latter two counts, but convicted him on the conspiracy count. On appeal of the first conviction, we reversed Price's conviction because the testimony of an Internal Revenue Service agent improperly bolstered the

credibility of other witnesses, and we remanded for a new trial. *United States v. Price,* 722 F.2d 88 (5th Cir. 1983).

Pursuant to our remand, Price was retried for conspiracy to obtain gratuities. The jury again found Price guilty on a superseding indictment limited to the conspiracy charge in violation of 18 U.S.C. 201(g). He was convicted and sentenced to a maximum prison term of five years and a $5,000 fine. Price has appealed this second conspiracy conviction, arguing that under the doctrine of collateral estoppel, the trial court improperly permitted the introduction of evidence which should have been barred as a result of his acquittal of the perjury and tax evasion charges. We reject Price's arguments, and affirm the district court.

I.

At the initial trial, the conspiracy case was based principally on the testimony of Naar, Mazziotti and Goodman, three individuals who owned a company that sold toys to the AAFES. Each of the three testified that he paid cash to Price to remain in his favor and had paid for several of his dinners. Mr. Ylda, a former AAFES employee, also testified that he had given Price half a $1,000 payment he had received from a supplier and told Price that, in return for his favors, he could receive appliances free of charge from another AAFES supplier. All four of the witnesses testified at the first and second trials.

At the first trial, one of the allegations of perjury was that Price had falsely declared that he had never received anything of value from Mr. Ylda, and did not receive any cash payments. Another allegation of perjury was that Price falsely declared that he had no knowledge of any AAFES employees receiving money or anything of value from the toy manufacturers. The income tax evasion charge was based on Price's failure to report the bribes he allegedly received as income.

The elements of perjury are that the statement must be false, material and made with knowledge of its falsity. 18 U.S.C. § 1623; *United States v. Dudley*, 581 F.2d 1193 (5th Cir. 1978). The elements of income tax evasion are that an additional tax is due and owing, an attempt is made to evade or defeat such tax, and the attempt is willful. *Sansone v. United States*, 380 U.S. 343, 85 S.Ct. 1004, 13 L.Ed.2d 882 (1965); *United States v. Dwoskin*, 644 F.2d 418 (5th Cir. 1981). The elements of the third offense with which Price was charged, conspiracy to violate section 201, require proof that the conspiracy existed, that the accused knew it existed and with that knowledge, voluntarily joined it, and that one of the conspirators performed an overt act in furtherance of the conspiracy. *See United States v. Wieschenberg*, 604 F.2d 326 (5th Cir. 1979); *United States v. Barrentine*, 591 F.2d 1069 (5th Cir. 1979). Thus, some evidence admitted to prove the necessary elements of one offense established the necessary elements of the other offenses. For example, evidence that Price received illegal kickbacks would tend to prove not only a violation of section 201 but perjury as well, since he denied receiving funds before the grand jury. The fact would also prove evasion of income tax, since he never reported illegal kickbacks as income.

Ylda and the three representatives of the toy manufacturer testified at the second trial that they made cash payments to Price at his requests, and the toy manufacturer's representatives testified that they paid for several of Price's dinners. On appeal, Price argues that the testimony of these witnesses should have been barred in the second trial under the doctrine of collateral estoppel since the first jury in its two acquittals necessarily must have found that he had not received any illegal kickback, and had no knowledge that the other employees were engaging in such activity. We must decide, therefore, whether the doctrine of collateral estoppel applies to bar the introduction of evidence in the second trial when an arguably inconsistent verdict is rendered in the first trial. We hold that the doctrine has no application in this case.

II.

It has long been recognized that criminal juries in the United States are free to render "not guilty" verdicts resulting from compromise, confusion, mistake, leniency or other legally and logically irrelevant factors. *Dunn v. United States,* 284 U.S. 390, 393-94, 52 S.Ct. 189, 190-91, 76 L.Ed. 356 (1932). Consequently, an acquittal is not necessarily to be taken as the equivalent of a factual finding of innocence; nor does it necessarily reflect a failure of proof on the part of the prosecution. *United States v. Espinosa-Cerpa,* 630 F.2d 328 (5th Cir. 1980). It is for these reasons that a conviction cannot be set aside merely because it is inconsistent with other findings of the jury verdict. *Harris v. Rivera,* 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981). We consider each count in a multi-count verdict separately, and a guilty verdict upon any count may stand, notwithstanding its inconsistency, provided it is supported by substantial evidence. *United States v. Varkonyi,* 611 F.2d 84 (5th Cir. 1980).

The application of this rule becomes less clear when it is considered with the doctrine of collateral estoppel on retrial. The doctrine of collateral estoppel is one aspect of the protection afforded by the double jeopardy clause. The doctrine prevents an issue of ultimate fact that has been determined by a valid and final judgment from being relitigated between the same parties in any future lawsuit. *Ashe v. Swenson,* 379 U.S. 436, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970); *United States v. Lee,* 622 F.2d 787, 789 (5th Cir. 1980). Even though the doctrine affects the introduction of evidentiary facts necessarily determined in a prior lawsuit, *United States v. De La Torre* 639 F.2d 245 (5th Cir. 1981), it does not prevent re-examination of an issue that is not necessarily determined in the former trial. *Adams v. United States,* 287 F.2d 701 (5th Cir. 1961).

Ylda testified at the second trial that a $1,000 illegal payment had been shared between him and Price and that other bribes had been discussed with him. The three manufacturers' representatives also testified at the second trial, *inter alia*, that Price had requested illegal bribes, and that such payments were made to him. Price argues that the first jury, in acquitting him on the perjury charge, necessarily must have determined that he had no knowledge of the activities of other AAFES employees and that he had not received any illegal kickbacks. He also argues that by his acquittal the jury found that Ylda and the manufacturers' representatives were not credible. Having made these determinations in the first trial, Price argues that collateral estoppel precludes the admission of their testimony.

Prices's arguments that the evidence is inadmissible on retrial would be more convincing had the first jury simply mistried rather than having convicted him of the conspiracy charge. The first jury by its conviction, however, necessarily found him culpable and resolved factual issues adversely to him. His conviction of conspiracy indicates that while the testimony of Ylda and the other three *may* have been rejected by the first jury for purposes of the perjury and tax evasion charges — possibly as a result of error, misunderstanding or compromise, — it was not rejected as it related to the conspiracy charge. The testimony of these four witnesses at the second trial was not introduced to create a climate of illegal activity, but was introduced solely to prove conspiracy, and the evidence was relevant for this purpose; no evidence was introduced that was relevant *only* to prove an income tax evasion or perjury charge. Counsel for Price conceded this point at oral argument.

Finally, we address Price's contention that his case is analogous to *United States v. Mespoulede*, 597 F.2d 329 (2d Cir. 1979). In *Mespoulede*, the defendant was charged in a two-count indictment with conspiracy to distribute cocaine, and with

possession of cocaine with an intent to distribute it. The jury acquitted Mespoulede of the posession count, but failed to reach a verdict on the conspiracy count. On retrial, the trial court allowed the prosecution to introduce evidence that he had possessed cocaine, stating that the evidence of possession, when considered with other evidence, was probative of his participation in the conspiracy. The Second Circuit reversed, finding that collateral estoppel precluded the introduction of any evidence of possession, since the jury necessarily decided the possession issue in his favor. The court's position was that it would place an unjust burden on a defendant to require him to relitigate the very issue a jury decided in his favor, and the introduction of such evidence would subject the defendant to a second risk of conviction for his actions.

Our case is distinguishable from *Mespoulede*. An overriding distinction is that here no evidence *necessarily* found in Price's favor was introduced in the second trial. Second, Price, unlike Mespoulede, had been convicted for the offense for which he was retried. *See Mespoulede* at 337 n.13. The conviction in Price's first trial simply meant that the jury returned an inconsistent verdict — valid and supportable — and hence the acquittals as to the other counts are not to be read as a finding of fact favorable to Price on testimony which overlapped each count. In *Mespoulede* the jury returned no verdict of conviction on the conspiracy count, but only a verdict of acquittal on the substantive count. Finally, the evidence that Mespoulede was in possession of drugs was received as merely probative of the crime of conspiracy; hence the importance of the evidence was not sufficient to balance against the equities in favor of fairness of the defendant. Here, Price's acceptance of the cash payments and gratuitous dinners was the crux of the prosecution on the conspiracy count at the first trial and on retrial.

III.

Our holding recognizes that reconciling inconsistent verdicts with the doctrine of collateral estoppel is best approached on a case-by-case basis, and that our approach should be one based on realism and rationality. We are guided by the general principle that collateral estoppel ordinarily does not apply when the offense on retrial is the same offense on which the defendant was convicted in the first trial. The underlying purpose of collateral estoppel is to "protect a man who has been *acquitted* from having to 'run the gauntlet' a second time." *Ashe v. Swenson*, 397 U.S. at 446, 90 S.Ct. at 1195. (Emphasis added.) Here there was no acquittal on the conspiracy count. We hold therefore that because Price was convicted of conspiracy in the first trial, collateral estoppel does not bar the introduction of evidence in the second trial which directly supports the conspiracy, even though the same evidence was offered in the first trial in support of the perjury and tax evasion counts. Accordingly, the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-1180

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

REX J. PRICE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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(November 22, 1983)

Before RUBIN, GARWOOD, and JOLLY, Circuit Judges.

RUBIN, Circuit Judge:

A former employee of the Army Air Force Exchange Service was charged with conspiracy to obtain gratuities in violation of law and to defraud the United States, with making false statements before a federal grand jury, and with income tax evasion. A key issue in his trial on all three counts was the credibility of persons who had sold toys to the Exchange Service and had allegedly given gratuities to the accused. The government elicited testimony from an Internal Revenue Service Agent who, in testifying on the income tax charge, stated that he had based his computations on the statements of two of the

government witnesses and that he believed them. Because his testimony was improperly admitted and cannot be considered harmless, we reverse the conviction and remand for a new trial.

Rex J. Price was employed by the Exchange Service from 1966 to 1981. At the time of the events that gave rise to the charges against him he was assigned to Exchange Service Headquarters and was responsible for buying toys. The indictment charged that he conspired to defraud the United States and to violate 18 U.S.C. § 201, which forbids a government employee to accept a gratuity, that he made a false statement before a grand jury in violation of 18 U.S.C. § 1623, and that he evaded income taxes in violation of 26 U.S.C. § 7201. The conspiracy case was based principally on the testimony of three individuals who owned a company that sold toys to the Exchange Service. Each of the three testified that he paid cash to Price to remain in his favor. The income tax count was based on Price's failure to report the money thus received. An Internal Revenue Agent, James Whitfield, testified about Price's tax liability. He based this on an exhibit showing Price's income, which included the alleged payments made by two of the toy sellers. He also testified that he relied on their statements because he "believed them." The trial court refused to instruct the jury to disregard this testimony but instead told the jury only that "they are the sole judges of the credibility of the witnesses, including this witness and all other witnesses." He denied a motion for a mistrial.

"No principle in the law of evidence is better settled," the court said in United States v. Holmes, 26 F. Cas. 349, 352 (C.C.D. Me. 1858)(No. 13,382), "than . . . the rule . . . that testimony in chief of any kind, tending merely to support the credit of the witness, is not to be heard except in reply to some matter previously given in evidence by the opposite party to impeach it." *See also* Fed. R. Evid. 608(a)(2)(evidence of witness's truthful character admissible only after character for truthfulness has been attacked). The basic justification for this rule of evidence is that

"time should [not] be spent in proving that which may be assumed to exist. Every witness may be assumed to be of normal moral character for veracity, just as he is assumed to be of normal sanity." 4 J. Wigmore, Evidence § 1104, at 233 (Chadbourn rev. 1972). But in some instances, the introduction of such testimony bolstering the credibility of witnesses may cause harm that goes beyond the mere wasting of time. When bolstering testimony suggests to the jury that it may shift to a witness the responsibility for determining the truth of the evidence, its admission may constitute reversible error. *See* Homan v. United States, 279 F.2d 767 (8th Cir.), *cert. denied*, 364 U.S. 866, ... S.Ct. ...., ... L.Ed. .... (1960). Agent Whitfield's statements were tantamount to "expression[s] of his general belief as to how the case should be decided," which are not only prejudicial but also "wholly without value to the trier of fact in reaching a decision." McCormick, Handbook of the Law of Evidence § 12, at 26-27 (Cleary ed. 1972).

The government does not dispute these precepts. It says in reply only this: "Even assuming Whitfield's testimony exceeded strict propriety, there was no basis for declaring a mistrial. An alleged prejudicial statement may be rendered harmless by curative instructions." This, too, is correct when proper curative instructions are given. Here, however, the district court merely instructed the jury that it was to weigh the credibility of the witnesses, including that of the bolstering witness, and give it the "weight and value" it believed the testimony deserved. If the jury believed Whitfield, this added to the bolstering effect of the testimony.

We cannot say that Whitfield's testimony was harmless.[1] The jury was required to choose between the testimony of the toy

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[1] *Cf.* Kauz v. United States, 188 F.2d 9 (5th Cir. 1951)(testimony as to witness's reputation for truth and veracity, which had not been attacked, harmless error).

sellers and that of the accused. It found Price guilty on the conspiracy count, presumably crediting the testimony that he had received gratuities, but acquitted him of the perjury charge and of tax evasion. These results appear to be inconsistent, but they mean at least that the jury was not prepared to find Price completely culpable. In practical terms, the government's case hinged on the testimony of the witnesses whose credibility was bolstered by Whitfield's testimony. *Cf.* United States v. Dorr, 636 F.2d 117, 121 (5th Cir. 1981) (ordering new trial because of bolstering of government witness by prosecutor in closing argument).

Price also objects to the admission of the chart prepared by Whitfield summarizing his estimate of Price's unreported income from the gratuities, which was based on the testimony of the toy sellers. The general rule in this circuit is that the admission of such summary charts is discretionary with the trial court. Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955). It has been recognized, however, that this discretion may be abused. In Steele v. United States, 222 F.2d 628 (5th Cir. 1955), the defendant's tax evasion conviction was reversed because prejudicial summary charts were sent to the jury while it was considering its verdict. The defendant's argument, which this court accepted, was that the charts did not merely summarize the witnesses' testimony but "undertook to evaluate it, endeavoring to pass upon the reliability and credibility of certain witnesses and to determine what weight should be given their testimony, so that . . . the Government, through its witness Howard, was enabled to invade, indeed to take over the province of the jury." *Id.* at 630. *See also* Baines v. United States, 426 F.2d 833 (5th Cir. 1970).

We need not decide whether the admission of the chart alone would have constituted reversible error in this case. The chart did not stand merely as a tacit endorsement of the testimony of the toy sellers. Rather, Agent Whitfield's explicit endorsement was

drawn out by the government in an exchange than spans four pages in the trial transcript. Generally, it is best to require the maker of a summary chart to disclose the basis for his computations before admitting the chart into evidence. *Lloyd*, 226 F.2d at 17. Such testimony was adequately brought out by the defense on cross examination, when Whitfield admitted that the entire exhibit was based on his "assumption" that the toy sellers were telling the truth. In going beyond that admission and prodding Whitfield to state, on redirect examination, that he *believed* the toy sellers, the government crossed the line between laying a proper foundation for the chart and eliciting bolstering testimony that usurped the jury's rightful place.

The remaining issues merit little discussion. The testimony of the toy seller and of Price's immediate subordinate were sufficient to take the case to the jury. United States v. Davis, 666 F.2d 195, 201 (5th Cir. 1982). The hearsay testimony of the alleged co-conspirators was properly admitted under United States v. James, 590 F.2d 575 (5th Cir.), *cert. denied*, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). The non-hearsay testimony of a co-conspirator is sufficient to establish the defendant's membership in a conspiracy. United States v. Caro, 569 F.2d 411, 420 (5th Cir. 1978). The affidavit for a search warrant showed probable cause for the search of Price's home, so the motion to suppress was properly denied. Defense Exhibits 22, 23 and 24 were properly rejected for want of a sufficient foundation. There was no abuse of discretion in denying the motion to depose a witness who purportedly resided in a foreign country. No evidence of that witness's inability to attend the trial was adduced.

For these reasons, the judgment of conviction is REVERSED. The case is REMANDED for further proceedings not inconsistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1445

D. C. Docket No. CR-3-82-231-R

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

REX J. PRICE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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Before GEE, WILLIAMS and JOLLY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

January 2, 1985

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1445

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

REX J. PRICE,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion January 2, 1985, 5 Cir., 198.... , ...F.2d....)

(February 11, 1985)

Before GEE, WILLIAMS and JOLLY, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the

Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT

E. GRADY JOLLY
Unitd States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA	*	
	*	CRIMINAL NO. 3-82-231-R
V.	*	(Supersedes indictment
	*	filed August 10, 1982)
REX J. PRICE	*	

The Grand Jury charges:

COUNT 1

1. At all times material to this conspiracy, the Army and Air Force Exchange Service (AAFES) is an agency and instrumentality of the United States. The purpose of AAFES is to purchase merchandise and services of necessity and convenience for resale to active duty and retired United States Military personnel and their dependents worldwide. The mission of AAFES is to serve and benefit said United States Military Personnel.

2. At all times material to this conspiracy, the worldwide Headquarters of AAFES is located in the Northern District of Texas, Dallas Division.

3. From on or about August of 1966 and until his separation for cause on or about September of 1981, REX J. PRICE, defendant, was an employee of AAFES. From on or about January of 1975 until on or about August of 1980, REX J. PRICE, defendant, was Supervisory Merchandising Specialist of the Toy Unit of AAFES at its Headquarters. As Supervisory Merchandising Specialist, REX J. PRICE, defendant, was responsible for procuring and for directing the procurement of toys for and on behalf of AAFES.

4. At all times material to this conspiracy, Churchill Sales Co., Inc. is a military sales representative that represents, in return for a commission, vendors who sell merchandise to AAFES. At all times material to this conspiracy, Martin Goodman, Robert Naar, Anthony Mazziotti and Bernard Blacksberg are officers and directors of said corporation.

OBJECT OF CONSPIRACY

5. From on or about January of 1975, and continuously thereafter through on or about August of 1980, the exact dates being unknown to the Grand Jury, in the Dallas Division of the Northern District of Texas and elsewhere, REX J. PRICE, defendant, did unlawfully, wilfully and knowingly agree, combine, conspire and confederate with Martin Goodman, Robert Naar, Anthony Mazziotti, Bernard Blacksberg and Churchill Sales Co., Inc., and with other persons both known and unknown to the Grand Jury, to commit offenses against the United States, to wit: (1) to violate Title 18, United States Code, Section 201; and (2) to defraud the United States by conducting the business of AAFES in such a way as to obtain and retain secret profits for himself.

MANNER AND MEANS

Among the manner and means by which REX J. PRICE, defendant, and the other conspirators would carry out the conspiracy were the following:

6. It was part of the conspiracy that REX J. PRICE, defendant, would ask, demand, exact, solicit, seek, accept, receive and agree to receive currency and other things of value from various officers and directors of Churchill Sales Co., Inc., and from vendors represented by Churchill Sales Co., Inc.

7. It was part of the conspiracy that said currency and other things of value as set forth in paragraph 6 above would constitute and represent profits which REX J. PRICE, defendant, and the other conspirators, wished to keep secret and would keep secret from the United States and AAFES.

8. It was part of the conspiracy that REX J. PRICE, defendant, would be in a position to and would influence the purchases AAFES would make from vendors represented by Churchill Sales Co., Inc.

OVERT ACTS

9. The Grand Jury charges that in furtherance of the aforesaid conspiracy, and to accomplish the objects thereof, the conspirators did, in the Northern District of Texas and elsewhere, commit certain overt acts, including:

(1) On or about June 3, 1976, Fisher-Price Toys, a Division of Quaker Oats Company, Inc., retained Churchill Sales Co., Inc. as its military sales representative to AAFES.

(2) On or about October 7, 1979, Martin Goodman paid REX J. PRICE, defendant, the sum of $8,000.00 in currency at the Cottage Lounge, 3006 W. Northwest Highway, Dallas, Texas 75220.

(3) On or about July 21, 1980, REX. J. PRICE, defendant, had dinner at the Old Warsaw Restaurant in Dallas, Texas with Martin Goodman and Robert Naar and with two employees of said Fisher-Price Toys.

A violation of Title 18, United States Code, Section 371.

COUNT 2

1. The Grand Jury realleges and incorporates paragraphs 1, 2 and 3 of count 1 of this Indictment with the same force and effect as if restated in its entirety.

2. On February 27, 1979, in the Northern District of Texas, REX J. PRICE, defendant, while under oath as a witness in a proceeding before a Federal Grand Jury sitting in Dallas, Texas, did knowingly make a false material declaration in violation of 18 U.S.C. §1623.

3. At the aforesaid time and place, the Grand Jury was conducting an investigation to determine among other things, whether employees of AAFES were receiving bribes from individuals and companies selling or attempting to sell to AAFES.

4. It was material to the Grand Jury investigation to determine if employees of AAFES had received any monies, gifts, gratuities, or anything of value from any individual or company selling or attempting to sell to AAFES.

5. During the course of his testimony at the aforesaid time and place, REX J. PRICE, defendant, while under oath, did knowingly and falsely declare with respect to the aforesaid material matter as follows:

[False declarations are underscored]

Q. Now Mr. Price, you were Mr. Ylda's supervisor. Are you aware if Mr. Ylda received anything of value from anyone during the time that he was under your supervision, either mil reps or manufacturers or anybody selling to the Exchange?

A. I know he received some packages in the office that were returned, from the manufacturers. It was dates and apricots, dried apricots, this sort of thing. A gift package that was returned to the manufacturer.

Q. Anything else that you're aware of that he received?

A. No, I'm not.

* * *

Q. Has Mr. Ylda ever given you anything of value, either entertained you or given you merchandise, or has he given you money?

A. No. Only if I borrowed — I might have borrowed some money up in New York from him.

* * *

Q. Are you aware that Mr. Ylda was ever entertained, taken to lunch or dinner by anybody selling to AAFES, be it a mil rep, manufacturer's rep, or consultant or manufacturer?

A. Yes.

Q. Can you tell us about that?

A. We both went to dinner. It was in — I believe it was in 1976. I believe we went to dinner with Ray Larsen and Associates.

Q. Who picked up the tab for that?

A. Ray Larsen.

Q. Anything else that you know, that Mr. Ylda was entertained?

A. No. Usually when we worked in the – we were working in the market, we worked through our lunch hour, we might have a sandwich sent up.

Q. Are you aware of Mr. Ylda receiving any merchandise, other than what you just mentioned, that was sent to his home?

A. No, I'm not.

Q. Are you aware of any cash payments made to him?

A. No.

* * *

Q. Now, Mr. Price, as you know, this Grand Jury is investigating bribery, kickbacks and gratuities to AAFES employees. Do you have any information that would be helpful to the Grand Jury in its investigation? Specifically, do you know or have you heard any rumors of AAFES employees receiving money or anything of value from people who sell to the Exchange, be they manufacturers or any of these three agent categories?

A. No, I have not. Other than what I read on the Pezzello thing.

Q. What you read in the newspaper?

A. Yes.

6. The aforesaid testimony of REX J. PRICE, defendant, as he then and there knew and believed, was false in that REX J. PRICE, defendant, had received monies and other things of value from individuals and companies selling or attempting to sell to AAFES, and further REX J. PRICE, defendant had knowledge of other AAFES employees receiving monies, gifts and things of value.

A violation of Title 18, United States Code, Section 1623.

COUNT 3

On or before April 15, 1980, in the Dallas Division of the Northern District of Texas, REX J. PRICE, defendant, a resident of Carrollton, Texas, who during the calendar year 1979 was married, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1979, by preparing and causing to be prepared, by signing and causing to be signed, and by mailing and causing to be mailed, in the Dallas Division of the Northern District of Texas, a false and fraudulent income tax return on behalf of himself and his wife, which was filed with the Internal Revenue Service, wherein it was stated that their joint tax table income for said calendar year was the sum of twenty-nine thousand, one hundred and twenty-seven dollars and eight-one cents ($29,127.81), and that the amount of tax due and owing thereon was the sum of four thousand, nine hundred and ninety-three dollars ($4,993.00), whereas, as he then and there well knew and believed, their joint tax table income for said calendar year was an amount substantially in excess of the reported amount of twenty-nine thousand, one hundred and twenty-seven dollars and eighty-one cents ($29,127.81) and the amount of tax due and owing thereon was an amount substantially in excess of the reported amount of four thousand, nine hundred and ninety-three dollars ($4,993.00).

A violation of Section 7201, Internal Revenue Code; Title 26, United States Code, Section 7201.

A TRUE BILL

BARBARA TAFFORD
Foreman

JAMES A. ROLFE
United States Attorney

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(214) 767-0951

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA	*	CRIMINAL NO. 3-82-231-F
	*	(Supersedes indictments
V.	*	filed November 9, 1982
	*	and August 10, 1982)
REX J. PRICE	*	

The Grand Jury charges:

1. At all times material to this conspiracy, the Army and Air Force Exchange Service (AAFES) was an agency and instrumentality of the United States. The purpose of AAFES is to purchase merchandise and services of necessity and convenience for resale to active duty and retired United States Military personnel and their dependents worldwide. The mission of AAFES is to serve and benefit said United States Military Personnel.

2. At all times material to this conspiracy, the worldwide Headquarters of AAFES was located in the Northern District of Texas, Dallas Division.

3. From on or about August of 1966 and until his separation for cause on or about September of 1981, REX J. PRICE, defendant, was an employee of AAFES. From on or about January of 1975 until on or about August of 1980, REX J. PRICE, defendant, was Supervisory Merchandising Specialist of the Toy Unit of AAFES at its Headquarters. As Supervisory

Merchandising Specialist, REX J. PRICE, defendant, was responsible for procuring and for directing the procurement of toys for and on behalf of AAFES.

4. At all times material to this conspiracy, Churchill Sales Co., Inc. was a military sales representative that represents, in return for a commission, vendors who sell merchandise to AAFES. At all times material to this conspiracy, Martin Goodman, Robert Naar, Anthony Mazziotti and Bernard Blacksberg were officers and directors of said corporation.

OBJECT OF CONSPIRACY

5. From on or about January of 1975, and continuously thereafter through on or about August of 1980, the exact dates being unknown to the Grand Jury, in the Dallas Division of the Northern District of Texas and elsewhere, REX J. PRICE, defendant, did unlawfully, wilfully and knowingly agree, combine, conspire and confederate with Martin Goodman, Robert Naar, Anthony Mazziotti, Bernard Blacksberg and Churchill Sales Co., Inc., and with other persons both known and unknown to the Grand Jury, to commit offenses against the United States, to wit: to commit various offenses of Title 18, United States Code, Section 201(g), the illegal receipt of gratuities by a public official.

MANNER AND MEANS

Among the manner and means by which REX J. PRICE, defendant, and the other conspirators would carry out the conspiracy were the following:

6. It was part of the conspiracy that REX J. PRICE, defendant, would ask, demand, exact, solicit, seek, accept, receive and agree to receive currency and other things of value

from various officers and directors of Churchill Sales Co., Inc., and from vendors represented by Churchill Sales Co., Inc.

7. It was part of the conspiracy that said currency and other things of value as set forth in paragraph 6 above would constitute and represent profits which REX J. PRICE, defendant, and the other conspirators, wished to keep secret and would keep secret from the United States and AAFES.

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OVERT ACTS

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A violation of Title 18, United States Code, Section 371.

A TRUE BILL

SANDRA BORCHELT
Foreman

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